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## QUESTIONS PRESENTED.

I. Respondents have abandoned previous arguments and now extensively argue facts to support their position.

II. Petitioner has consistently argued throughout this litigation that the defendants were guilty of an unlawful conspiracy to monopolize violative of Section 2 of the Sherman Act.

III. The evidence establishes all elements of an illegal tying agreement which is a *per se* violation of Section 1 of the Sherman Act.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 306

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FORTNER ENTERPRISES, INC., - - - - *Petitioner,*

*v.*

UNITED STATES STEEL CORPORATION,
U. S. STEEL HOMES CREDIT CORPORATION, *Respondents.*

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## REPLY BRIEF FOR PETITIONER.

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### ARGUMENT.

#### I.

#### Respondents Have Abandoned Previous Arguments and Now Extensively Argue Facts to Support Their Position.

Respondents have devoted the first thirty pages of their brief to an alleged Statement of the Case which is an extensive argument of facts and inferences which they draw from the facts. Many of the alleged facts relied upon are out of context or contrary to facts relied upon by Petitioner. This same procedure is followed in the argument portion of the brief. Respondents' brief sounds more like an argument before a jury, vainly trying to draw inferences which favor their side.

Petitioner has set forth in its brief many of the facts favorable to it which clearly show that summary judgment in Respondents' favor was not warranted. When reviewing a Summary Judgment all facts and inferences most favorable to the one against whom the Judgment went must be reviewed. This Court has said in *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 7 L. Ed. 2d 458 (1962), at page 473:

> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'."

Respondents repeatedly attack the creditability of Petitioner's witnesses, Fortner and Horn, and raise questions about their affidavits. Respondents caused these affidavits to be filed by making the Motion for Summary Judgment. Those affidavits and the other evidence relied upon by Petitioner establish the offenses charged.

Petitioner will not dignify a detailed factual jury type argument with an item by item reply since those

facts must be viewed in the light most favorable to Petitioner. Petitioner is prepared to respond to any of the inferences Respondents draw in their favor if the Court so desires.

It is clear from the beginning of Respondents' brief that they have abandoned the arguments they made before the District Court and the Sixth Circuit. The reason for their factual argument is found in the following quotation from page 4 of their brief:

> "Moreover, the detailed record treatment is offered to facilitate this Court's independent review apart from the opinion of the District Court, since the decision of a lower court will be affirmed if the result is correct even though the decision relies upon wrong grounds. Helvering v. Gowron, 302 U. S. 238 (1937)."

Petitioner submits that counsel who wrote Respondents' brief recognized the invalidity of the position taken below and has laboriously attempted to justify that position by factual argument.

## II.

### Petitioner Has Consistently Argued Throughout This Litigation That the Defendants Were Guilty of an Unlawful Conspiracy to Monopolize Violative of Section 2 of the Sherman Act.

There is and has always been two phases to Petitiner's case. First, we have and do argue that United States Steel Corporation and U. S. Steel Homes Credit Corporation conspired to establish with Petitioner an illegal tying agreement and that they then conspired

to coerce enforcement of that illegal agreement and that this is a *per se* violation of Section 1 of the Sherman Act.

Secondly, we have urged and do urge that the above conspiracy was part of a broader conspiracy to monopolize violative of Section 2 of the Sherman Act by use of their power in the lending area through contracts (loan agreements) which eliminate competition with Homes Division by use of the restricted tie-in clauses.

The firm of White and Case and its representative, Macdonald Flinn, first became involved with this litigation after the Petition for Certiorari had been filed with this Court. From the draft of the Respondents' Brief served on Petitioner's counsel on January 2, 1969, pursuant to this Court's ruling, that firm wrote Respondents' Brief. If counsel for that firm had been present at the argument before the District Court, he would know that the argument on conspiracy to monopolize was made at that time. We need merely refer the Court to pages 64 and 65 of our Brief to the Sixth Circuit (Respondents' Appendix, pages 13a and 14a), to see that the argument was made in that Court:

> "The Complaint and Amended Complaint in this case also charge the Defendants with violation of Section 2 of the Sherman Act in that they combined or conspired to monopolize a part of the trade or commerce among the several states. The conspiracy to monopolize under Section 2 requires a mere showing of intent to monopolize a part of trade or commerce, but 'monopoly power' does not have to be established. It is sufficient if some

appreciable part of interstate commerce is the subject of the conspiracy. *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563 (1961), at page 573. The dollar volume of commerce involved in that case was $523,168.00 (p. 572) which the Court held was sufficient, citing the *International Salt* case, *supra*.

"It has been held that proof of a conspiracy to monopolize may be established without showing that the conspirators acquired power to carry out the object of the conspiracy. *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, and *U. S.* v. *Griffith*, 334 U. S. 100.

"The obvious purpose and intent of the Defendants in this case was to obtain as large a share of the prefabricated home market of Jefferson County, Kentucky and of the entire market area serviced by the Defendants. Their combination and conspiracy which (65) used unlawful means to attain this end, including coercive acts against the Plaintiff to maintain the position and effectuate their purpose, clearly had as its ultimate goal the obtention of as large a market share as possible with the accompanying power to control prices and exclude competitors. They were already exercising the power to foreclose or exclude competitors by use of their unlawful tying agreements.

"Plaintiff submits that it has established overwhelming evidence of a violation of Section 1 of the Sherman Act and that it has certainly submitted sufficient evidence to go to a jury on the charge of conspiracy to monopolize."

The matter was also argued orally before the Sixth Circuit.

Petitioner's pleadings, evidence, and arguments in all courts set forth the foundation for this charge and it is properly an issue before this Court.

Respondents do not respond to Petitioner's claim that there was evidence of a conspiracy to monopolize under Section 2 of the Sherman Act other than to claim that the issue was not raised below. Respondents, by their failure to so respond, have therefore admitted that it was improper to grant them Summary Judgment.

## III.

### The Evidence Establishes All Elements of an Illegal Tying Agreement Which Is a *Per Se* Violation of Section 1 of the Sherman Act.

Respondents' argument from pages 39 through 55 of their Brief is a factual one really designed to create a factual issue. Respondents overlook the fact that they are charged with a conspiracy and contract in violation of Section 1 of the Sherman Act. They attempt to treat themselves as one entity. They do not deny that they are chargeable as conspirators and they cannot.

Respondents argue that *United States* v. *Loew's, Inc.*, 371 U. S. 38, 45 (1962), does not mean what it says. The plain language of that case is that the requisite economic power in the tying element can be inferred from its desirability to consumers and uniqueness in attributes. The evidence most favorable in

the record to Petitioner meets both. The financing on the terms offered was unique in attributes and desirable to the consumer, Petitioner. Respondents' own records show that their loans were unique. The loans were the "tool" which enabled the Homes Division to make about 70% of its sales during the years in question.

The principal case relied upon by Respondents, *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923), is not in point on its facts and is long before the tie-in cases decided by this Court which are our present law. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958), and *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962).

In a case cited by Respondents this Court stated in 1963 in *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963):

> "We recently noted the importance of the nature of the tying arrangement in its factual setting:
>
> > 'Thus, unless the tying device is employed by a small company in an attempt to break into a market, cf. Harley-Davidson Motor Co., 50 F.T.C. 1047, 1066, the use of a tying device can rarely be harmonized with the strictures of the antitrust laws, which are intended primarily to preserve and stimulate competition.' Brown Shoe Co. v. United States, 370 U. S. 294, 330, 8 L. Ed. 2d 510, 538, 82 S. Ct. 1502."

Surely United States Steel and its subsidiary, U. S. Steel Homes Credit Corporation, do not claim that they are struggling small business concerns seeking to enter a new market!

To our amazement, Respondents, at page 49 of their Brief, equate themselves to the Government by arguing that the Government conditions performance on its financial assistance. The Government has the power to do so, plus the power to fix prices, to tax and to condemn, but this does not confer such rights on Repondents.

The typical financial transaction involves a lender loaning money and obtaining adequate security. There is nothing unusual or unique about the usual transaction. Where financing is used as a "tool" to create a restraint on competition and the financing is unique by its terms and desirable to consumers, the requisite economic power is present.

We have given the evidence we rely upon to support our position that the amount of commerce restrained as to the tied product exceeded the sum of $500,000.00, used in *International Salt, supra.* The loan agreements with Petitioner involved 219 houses. Even using Respondents' figures for .55 houses of $189,002.00, this was one-fourth of the houses Petitioner was required to buy. Thus, for all 219 we would have in excess of $750,000.00 of commerce in the tied product, using Respondents' own figures.

## CONCLUSION.

Respondents cannot rely upon inferences favorable to them and attack Petitioner's witnesses to justify a Summary Judgment which they admit was entered on improper grounds. Petitioner has maintained and still maintains that the tie-in agreement was illegal *per se* and that the Respondents conspired to obtain its entry and to enforce it. Petitioner's evidence justifies this position. Respondents appear to be attempting to create a factual issue which likewise justifies reversal.

Petitioner has consistently through the courts maintained its charge under Section 2 of the Sherman Act of conspiracy to monopolize and has never waived or abandoned it. Respondents have not responded to this charge and therefore admit at least that Summary Judgment as to that charge was not warranted.

The Summary Judgment should be reversed and the relief sought in Petitioner's Brief should be granted.

Respectfully submitted,

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